

ORIGINAL

(S E R V E D)
(January 24, 2001)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

January 24, 2001

DOCKET NO. 99-15

**DAVID P. KELLY AND WEST INDIES SHIPPING & TRADING, INC.--
POSSIBLE VIOLATIONS OF THE SHIPPING ACT OF 1984**

**JOINT REQUEST TO APPROVE SETTLEMENT AGREEMENT
GRANTED; PROCEEDING DISCONTINUED**

Respondents David P. Kelly and West Indies Shipping & Trading, Inc. and the Commission's Bureau of Enforcement (BOE) have reached agreement to settle this proceeding and have jointly requested that I approve their agreement and discontinue this proceeding. Their request is carefully explained, well supported by authorities, and fully meets the Commission's criteria for approval of settlement agreements in Commission proceedings. Accordingly, as explained below, the settlement agreement is approved pursuant to 46 C.F.R. 502.603(a) and the proceeding is discontinued subject to Commission review pursuant to 46 C.F.R. 502.227(c).

This proceeding began with the issuance of the Commission's Order of Investigation and Hearing on August 13, 1999, which Order was amended on June 26, 2000, to add another section of the Shipping Act of 1984 that respondents might have violated. Together with the amended Order, the Commission stated that it had information that the respondent corporation and Mr. Kelly, its president and sole shareholder, had been operating at least since May 1998 as an ocean transportation intermediary (OTI), more specifically, as a non-vessel operating common carrier (NVOCC), and in so doing had violated six different sections of the Shipping Act of 1984, namely, sections 8(a)(1), 10(a)(1), 10(b)(1), 19(a), 19(b)(1) and former section 23(a), which became section 19(b)(1) of the 1984 Act, effective May 1, 1999. In violating the six sections of the 1984 Act respondents apparently had been operating without a tariff on file with the Commission prior to May 1, 1999 and had not maintained a publicly available tariff after that date (vs. section 8(a)(1)); had obtained or attempted to obtain ocean transportation at less than the applicable rates and charges by an unjust or unfair device or means (vs. section 10(a)(1)); had been allowing persons to obtain transportation for property at less than the rates or charges shown in their tariff by means of false billing, false classification, etc. or by any other unjust or unfair device or means (vs. section 10(b)(1)); had been acting as an OTI without holding a license issued by the Commission (vs. section 19(a)); and had been acting as an OTI without obtaining a bond, insurance or other surety (vs. section 19(b)(1) and former section 23(a)). According to the information before the Commission in August 13, 1999, respondents had been operating illegally as an NVOCC since May 1998 and had done so with respect to at least 50 shipments, and had continued to operate illegally despite several warnings. Moreover, as the Commission's original Order of Investigation states, respondents "were fully aware that the shipments actually consisted of commodities different

from those listed on the ocean carrier bills of lading.” (Order at 2.) Accordingly, the Commission wished to determine if the above violations had occurred and, if so, whether civil penalties should be assessed and a cease and desist order issued.

For most of the period of this proceeding respondents retained legal counsel who objected to some of BOE’s discovery requests, among other things, raising arguments arising out of the Fifth Amendment to the Constitution. Nevertheless, counsel took the depositions of four witnesses in Miami, Florida, including the deposition of respondent David Kelly. After some delay occasioned by the preparation of the deposition transcripts and a motion to compel answers to certain questions in the face of Fifth Amendment objections, respondents, who were no longer represented by counsel, and BOE agreed to a schedule for the filing of their written evidentiary cases and legal briefs. However, before the time had come for the filing of BOE’s evidentiary case, the parties entered into settlement discussions that led to the instant agreement and request for its approval.

As stated by the parties in their joint memorandum seeking approval of their settlement agreement, BOE avers that it has evidence which it could introduce into the record if litigation were to resume that would prove that respondents had operated unlawfully as an NVOCC from August 1997 to February 1999, had failed to file or to maintain a tariff until September 1999, when they ceased operations, and at various times between August 1997 and September 1999 had operated as an NVOCC or OTI without obtaining a bond, insurance or other surety or a license. Moreover, BOE would also have proffered evidence to show that respondents had knowingly and willfully obtained or attempted to obtain transportation at less than the applicable rates and charges by misdeclaring cargoes to ocean common carriers during the period January 30, 1998 until August 27, 1999, and had allowed others to obtain transportation for property at less than their tariff rates and

charges during the time period February 27, 1999 to May 1, 1999. Furthermore, according to their joint memorandum, “[r]espondents admit the violations alleged and have agreed to a civil penalty of \$30,000.” (Joint Memorandum at 3.)

Approvability of the Settlement Agreement

BOE urges approval of the settlement agreement, which is attached as an appendix to this ruling. BOE states that the agreement is the result of negotiations between respondents, acting pro se, and BOE, and that it “reflects each party’s view of the case and its fair resolution.” (Joint Memorandum at 4.) BOE cites ample case authority favoring approval of settlement agreements in numerous cases as well as statutory and other authorities. BOE asserts that potential cost and uncertainties of success are valid factors to be considered in negotiation of settlements and recognizes the importance of balancing the agency’s policy of deterrence against litigative probabilities, administrative costs and such other matters as justice may require. (ICE. at 8.) BOE takes special note of the factor of ability to pay because of respondents’ relative size and financial condition and asserts that “[b]oth Kelly and West Indies presented to BOE credible documentation as to the extent of their ability to pay a civil penalty.” (*Id.* at 8.)

As regards the Commission’s policy of enforcement, BOE and respondents note that respondents have admitted BOE’s case against them but that the corporate respondent is no longer in operation and Mr. Kelly has agreed not to participate in ocean transportation other than as a bona fide employee of a licensed OTI. (*Id.* at 8.) Of course, respondents have also agreed to pay \$30,000 in lieu of a formal civil penalty. The Settlement Agreement attached to this ruling embodies the

above features and explains them in detail, for example, showing that respondent Kelly will not operate as an OTI or otherwise participate in international ocean transportation except as an employee for a period of three years. It is clear that the Settlement Agreement fully conforms to applicable law regarding the desirability and approvability of such agreements and should be approved.

Applicable Principles of Law

As explained in the parties' joint memorandum, there is much statutory and case authority favoring settlements in consideration of their many benefits in terminating expensive and time-consuming litigation. The Administrative Procedure Act (APA), in 5 U.S.C. sec. 554(c)(1), requires agencies to give interested parties an opportunity to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." The legislative history to the APA illustrates a congressional intent to read this provision of the APA broadly in order to effectuate its beneficial purposes. See Senate Committee on the Judiciary, APA-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946). The courts agree. See *Pennsylvania Gas and Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). In countless cases before the Commission, the Commission has consistently followed the above principles that strongly favor settlements. Perhaps the leading case on the subject is that of *Old Ben Coal Company v. Sea-Lad Service, Inc.*, 18 S.R.R. 1085, 1092 (I.D., administratively final, November 29, 1978). See also *Del Monte Corp. v. Matson Navigation Co.*, 19 S.R.R. 1037, 1039 (I.D., administratively final, December 27, 1979); *Behring International, etc.*, 20 S.R.R. 1025, 1032-33 (I.D., administratively

final, June 30, 1981). The Commission's rules of practice and procedure also embody the above policy favoring settlements. See, e.g., 46 C.F.R. 502.91; 46 C.F.R. 502.94(a)(1). See also *Alternative Dispute Resolution*, 26 S.R.R. 1032 (1993), and Docket No. 93-07 -*Alternative Dispute Resolution*, Policy Statement, 58 Fed. Reg. 38651 (July 19, 1993).

In approving settlement agreements the Commission does not merely rubberstamp them but is concerned that they not violate some law or public policy. *Old Ben Coal Company*, cited above, 18 S.R.R. at 1092-1093; *Jorge Villena*, 24 S.R.R. 1098, 1102 (I.D., administratively final, August 29, 1988). More specifically, it has been held that the criteria set forth in section 13(c) of the 1984 Act (nature of the violation and its gravity, degree of culpability, history of prior offenses, ability to pay, such other matters as justice may require) are essentially equivalent and relevant in both settling and determining civil penalties absent settlement. See *Armada Great Lakes/East Africa Service*, 23 S.R.R. 946,956 (1986); *Marcella Shipping Co., Ltd.*, 23 S.R.R. 857,866 (1986). See also *Far Eastern Shipping Co.*, 21 S.R.R. 743,759 (1982).

I find that the subject settlement agreement was entered into in good faith by BOE and respondents, violates no law or policy, satisfies relevant criteria, and terminates the instant litigation while fulfilling the Commission's enforcement and deterrence policies. It should be and hereby is approved and the instant proceeding is discontinued subject to Commission review pursuant to 46 C.F.R. 502.227(c).



Norman D. Kline
Administrative Law Judge

BEFORE THE
FEDERAL MARITIME COMMISSION

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DAVID P. KELLY AND WEST INDIES SHIPPING &
TRADING, INC. - POSSIBLE VIOLATIONS OF THE
SHIPPING ACT OF 1984

:
DOCKET NO.
99-15
:

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SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the "Agreement") is entered into between;

- 1) The Federal Maritime Commission's ("Commission") Bureau of Enforcement and
- 2) David P. Kelly and West Indies Shipping & Trading, Inc., the Respondents in Docket No. 99-15, hereinafter "Kelly", "West Indies" or "Respondents."

Whereas, the Bureau of Enforcement believes that:

- a) Kelly and West Indies Shipping violated section S(a)(1) of the 1984 Shipping Act by failing to file a tariff with the Commission from August 6, 1997 to February 26, 1999 and by failing to maintain a publicly available tariff in an automated tariff system during the time period May 1, 1999 until September 3, 1999;
- b) Kelly and West Indies Shipping violated section 1 O(a)(1) of the 1984 Shipping Act by knowingly and willfully obtaining or attempting to obtain transportation at less than the rates and charges otherwise applicable for certain identified shipments during the time

period January 30, 1998 until August 27, 1999;

c) West Indies violated section 10(b)(1) of the 1984 Shipping Act by allowing others to obtain transportation for property at less than the rates or charges established in its tariff for certain identified shipments made by West Indies Shipping during the time period February 27, 1999 to May 1, 1999;

d) Kelly and West Indies Shipping violated section 19(a) of the 1984 Shipping Act by acting as Ocean Transportation Intermediaries without holding a license issued by the Commission during the time period May 1, 1999 until September 3, 1999;

e) Kelly and West Indies Shipping violated section 19(b)(1) of the 1984 Shipping Act by acting as Ocean Transportation Intermediaries without obtaining a bond, insurance or other surety during the time period May 13, 1999 until September 3, 1999;

f) Kelly and West Indies Shipping violated section 23(a) of the 1984 Shipping Act prior to May 1, 1999 by acting as a non-vessel-operating common carrier without obtaining a bond, insurance or other surety during the time periods August 6, 1997 until May 28, 1998 and January 1, 1999 until February 21, 1999.

Whereas, the Commission acted upon such alleged violations by instituting FMC Docket No. 99-15, to which West Indies and Kelly, West Indies' sole owner and operator, have been named Respondents, in order to determine whether the Respondents violated sections 8(a)(1), 10(a)(1), 10(b)(1), 19(a), 19(b)(1) and 23(a) of the Shipping Act of 1984; whether, in the event violations are found, civil penalties should be assessed and, if so, the amount of penalties to be assessed; and whether an appropriate cease and desist order should be issued;

Whereas, Respondents admit to the violations as alleged herein and in the Commission's Order of Investigation and have agreed to cease and desist from further activities in ocean transportation as outlined *infra*;

Whereas, the Bureau of Enforcement and Respondents believe it is in the best interests of the parties and the shipping public to resolve the above referenced proceeding rather than engage in further litigation; and

Whereas, Respondents have terminated the practices which are the basis for the alleged violations set forth herein.

NOW THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalties arising from the alleged violations set forth and described herein, Respondents and the Commission's Bureau of Enforcement hereby agree upon the following terms of settlement:

1. Respondents shall provide to the Commission a cashier's check payable to the Federal Maritime Commission in the amount of \$30,000 (Thirty Thousand Dollars);
2. For a period of three (3) years, Respondent Kelly shall not operate as an Ocean Transportation Intermediary, serve as an officer, director, principal or Qualifying Individual of an Ocean Transportation Intermediary, or otherwise participate in international ocean transportation in any manner whatsoever, except as an employee of a company conducting such business;
3. Respondents shall not act as an Ocean Transportation Intermediary without first having a license, a publicly available tariff and a bond for such service as required by law, nor shall Respondents otherwise hold themselves out to provide transportation as a common carrier by water between the United States and a foreign

country unless and until a license, a publicly available tariff and a bond for such services are obtained, nor shall Respondents act as an ocean freight forwarder without first obtaining a license and bond to do so as required by law;

4. Respondents consent to the entry of an Order by the Commission directing them to cease and desist from engaging in any of the practices enumerated above in paragraphs 2, and 3;
5. Upon approval of this agreement and the entry of a cease and desist order by the Commission as specified above, FMC Docket No. 99-1 5 shall be discontinued;

6. This Settlement Agreement shall become effective upon approval by the Commission
in accordance with 46 C.F.R. 502.603(a);

FOR THE RESPONDENTS:

David P. Kelly, as President of West Indies Shipping & Trading, Inc.

By: /s/ David P. Kelly Date: 01.18.01
David P. Kelly

David P. Kelly, in his individual capacity

By: /s/ David P. Kelly Date: 01.18.01
David P. Kelly

FOR THE BUREAU OF ENFORCEMENT:

By: /s/ Vem W. Hill Date: January 19, 2001
Vem W. Hill, Director
Bureau of Enforcement
Subject to Approval by the Commission in accordance with paragraph 6 hereof.